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No. 86-

IN THE

# Supreme Court Of The United States

October Term, 1986

JOHN H. LARY, JR.,

*Petitioner,*

v.

THE REPUBLIC OF CHINA,
a foreign government,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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*Petitioner*

## QUESTIONS PRESENTED

1. Does the Foreign Sovereign Immunites Act, 28 U.S.C. Sections 1330, 1331, 1391 (f), 1441 (d), 1602-1611, which became effective January 24, 1977, fail to apply to lawsuits between a citizen of a state of the United States and a foreign state when the events complained of result from an obligation entered into by the foreign state prior to 1952?

2. Do foreign states enjoy absolute immunity from suit in courts of the United States on account of foreign debt obligations if such obligations were entered into prior to 1952?

3. Does Article III Section 2 of the Constitution of the United States grant jurisdiction to the courts of the United States over controversies between a citizen of a state of the United States and a foreign state?

4. Does the F.S.I.A. fail to confer jurisdiction over China when she defaults on a bond payment due in the United States in 1982 and when such default has a direct effect in the United States, such failure to confer jurisdiction arising solely from the 1913 issuance date of that bond issue?

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner, John H. Lary, Jr., prays that a writ of certiorari issue to review the judgement of the United States Court of Appeals for the Eleventh Circuit.

## OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is printed as Appendix A. The unreported opinion of the United States District Court for the Northern District of Alabama is printed as Appendix B. The opinion of the Eleventh Circuit Court of Appeals in the case of **Jackson v. Peoples' Republic of China** is printed as Appendix C. The denial by the Eleventh Circuit of the petition for rehearing and suggestion for rehearing **en blanc** is printed as Appendix D.

## JURISDICTION

The judgement of the Court of Appeals was entered August 22, 1986, Appendix A. The timely petition for rehearing was denied by the Court on October 28, 1986, Appendix D. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATUTES INVOLVED

Foreign Sovereign Immunities Act of 1976, P.L. 94-583, 90 Stat. 2891, 28 U.S.C. 1330, 1331,1391 (f), 1441 (d), 1602-1611.

## STATEMENT OF THE CASE

The Imperial Chinese Government and its successor, the Republic of China, sold in the early years of the twentieth century a number of bearer bond issues. Among those bearer bond issues were the bond issues here complained of as follows: (1) the Hukuang Railways bonds of 1911 issued by the Imperial Chinese Government, (2) the Reorganization Gold Loan of 1913, (3) the Lung-Tsing-U-Hai Railway Gold Loan of 1913, (4) the Lung-Tsing-U-Hai 8% bonds of 1920, '21, '23, and (5) the Liberty Bonds of 1937. All these bond issues, except the Hukuang bonds, were issued by the government of the Republic of China.

In the year 1911 the Imperial Chinese Government fell in a revolution that brought to power the government of the Republic of China. Following the revolution, the Republic of China continued payment to the bondholders of those bonds, including the Hukuang bonds, issued by the Imperial Chinese Government. The Repulic of China also issued a number of bond issues, and paid interest on both the issues of the former Imperial Chinese Government issues and the Republic of China issues until the 1930's when worldwide economic and political disruptions caused suspensions in payments. The Republic of China extended the due dates of the Hukuang bonds to 1976 and that of the Lung-Tsing-U-Hai Gold Loan of 1913 to the year 1982 (see **Moody's International Manual** for those extensions). Because of the Sino-Japanese war, payments were further interrupted, prompting Chiang Kai-Chek, President of the Republic of China, in 1947 to issue the following official statement:

> China pledges her honourable intention to repay these external loans the service of which was suspended in the course of the Sino-Japanese war. In no way does the conclusion of new loans in recent years prejudice the security of these pre-war loans or vitiate the rights of holders of such bonds. At the same time China hopes soon to start a progressive programme of debt rehabilitation in accordance with the policy of upholding the national credit. Like so many other post-war nations to-day China will yet need international economic assistance to rehabilitate her trade and industry so as to strengthen her ability to make debt payments. Nevertheless the National Government is determined to do its best to fulfil its obligations and sincerely hopes that financial conditions will soon show sufficient improvement to enable it to make arrangements for an early resumption of the service of pre-war loans.
>
> Wilhelm Kuhlmann, **China's Foreign Debt**, pg. 9

The Waichiaopu on July 12, 1921 published two Sino-German Agreements relating to the re-establishment of the German Bank and the settlement of related Chinese bond and financial issues. Payment formerly due to the bondholders by the Deutsch-Asiatische Bank were taken up after the Sino-German Agreement in the United States by Irving Bank Columbia Trust Co., New York, (Wilhelm Kuhlmann, **China's Foreign Debt**, Appendix I).

China has made no payment of either interest or principal on any of these bond issues since the 1947 statement of President Chiang Kai-Chek. Most of the payments due in the 1930's and 1940's remain unpaid. All the bonds at issue here have substantial contact with the United States and their default caused a direct effect in the United States.

On July 6, 1983, plaintiff John H. Lary, Jr. filed suit Pro Se in the United States District Court for the Northern District of Alabama against the Republic of China requesting a judgement against the Republic of China for her defaults on these bond issues owned by plaintiff. English language and Chinese language summons, complaint, and notice of suit were served by certified mail upon the Republic of China in

accordance with the procedures of the Foreign Sovereign Immunities Act. On September 7, 1983, plaintiff filed the return receipt signed by an official of the Republic of China. On October 21, 1983, the Republic of China, through its American attorney, filed a motion for enlargement of time to answer or file responsive pleading; that motion was granted by the court. Plaintiff subsequently filed an amended complaint and, upon order of the court, a second amendment to the complaint. The Republic of China answered the complaint and both amendments.

On March 28, 1985, the Republic of China moved for a judgement on the pleadings. On August 30, 1985, the District Court dismissed the case with prejudice, citing **Jackson v. P.R.C.**, 596 F. Supp. 386 and concluding that the Foreign Sovereign Immunities Act of 1976 does not apply retroactively to a cause of action arising out of a 1911 transaction. Plaintiff filed a timely Notice of Appeal. The Eleventh Circuit denied both the plaintiff's appeal and his petition for rehearing and **en blanc** consideration.

## REASONS FOR GRANTING THE WRIT

### I.

### The Eleventh Circuit Has Decided An Important Question of Constitutional Law, The Meaning of Article III, Section 2, Wrongly and In Conflict With the Decisions of This Court.

The U.S. Constitution, Article III, Section 2, paragraph 1 states:

> The judicial powers shall extend to **all cases** in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States, between a State and a citizen of another State, between citizens of different States, between citizens of the same State claiming lands under

> grants of different States, and **between a State, or the citizens thereof, and foreign states**, citizens, or subjects. (emphasis added)

If a court should fail to take jurisdiction in a case in which a foreign state is sued by a citizen of Alabama, it would renounce part of the authority conferred and, consequently, part of the duty imposed upon it by the Constitution, because it would be a refusal to take cognisance of a controversy between a citizen of a State and a foreign state.

In 1972 the United States Supreme Court, in the case of **Chisholm v. Georgia**, 2 U.S. (2 Dallas) 419, affirmed that the Constitution means what it says.

There, Attorney-General of the United States Randolph affirmed, at p. 420:

> Nobody denies that the citizens of a state may sue foreign subjects, or foreign subjects the citizens of a state.

and at p. 421:

> What if a state should impair her own contracts? These evils, and others which might be enumerated like them, cannot be corrected without a suit against the state. It is not denied, that one state may be sued by another; and the reason seems to be the same, why an individual who is aggrieved should sue the state aggrieving.

The Attorney-General then, on p. 423, went on to explain, in defense of his doctrine that states were not immune from suit by citizens, that:

> . . . where the effects or property of one Prince are arrested in the dominions of another, the proprietory Prince may be summoned before the tribunal of that other.

Justice Blair wrote, on p. 451 (speaking of jurisdiction):

> It extends also to controversies between a state and a foreign state . . . To the Constitution of the United States, the term **sovereign** is totally unknown.

Justice Wilson, referring to states on p. 455 and 456, wrote:

> It may be bound by contracts; and for damages arising from the breach of those contracts . . . Is there any part of

> this description which intimates, in the remotest manner, that a state, any more than the men who compose it, ought not to do justice and full engagement? It will not be pretended there is . . . A state, like a merchant, makes a contract. A dishonest state, like a dishonest merchant, willfully refuses to discharge it; the latter is amenable to a court of justice; upon general principles of right, shall the former, when summoned to answer the fair demands of its creditors, be permitted, Proteus-like, to assume a new appearance, and to insult him and justice, by declaring I am a **sovereign** state? Surely not.

Justice Cushing, on p. 467 and 468, noted:

> Incident to these powers, and for preventing controversies between foreign powers or citizens from rising to extremities and to an appeal to the sword, a national tribunal was necessary, amicably to decide them, and thus ward off such fatal public calamity. Thus, states at home and their citizens and foreign states and their citizens, are put together without distinction, upon the same footing, so far as may be, as to controversies between them.

And he further noted, in expressing a noble high sentiment so often lost sight of by political men, that:

> The rights of individuals and the justice due to them are as dear and precious as those of states. Indeed, the later are founded upon the former; and the great end and object of them must be to secure and support the rights of individuals, or else, vain is government.

Chief Justice Jay, on p. 469, summarized Georgia's position thusly:

> Georgia refuses to appear and answer to the plaintiff in this action because she is a sovereign state, and therefore, not liable to such actions.

He then went on to reject Georgia's position by these words (on p. 473):

> It is plain, then, that a state may be sued, and hence it plainly follows, that suability and state sovereignty are not incompatible.

Justice Wilson related there of several ancient cases showing restricted sovereign immunity. In the sixteenth century, Don Diego successfully sued King Ferdinand before the Council which managed Indian affairs. There the court "with integrity which reflects honor on its proceedings, decided against the King". In England, under the Saxon government, according to the Mirror of Justice, the King's courts were open to all plaintiffs against the King or Queen as against any other of the people. Until the time of Edward I, the King of England might have been sued as a common person. Frederic, King of Prussia, knew that, "Judges ought to know, that the poorest peasant is a man, as well as the king himself: all men ought to obtain justice, since, in the estimation of justice, all men are equal, whether the prince complains of a peasant or a peasant complains of a prince," **Chisholm v. Georgia** at pages 459 and 460.

Chief Justice Jay settled the question as to how liberally the words of Article III Section 2 of the Constitution are to be construed. He stated on, page 476:

> This extension of power is remedial, because it is to settle controversies. It is, therefore, to be construed liberally.

Thus by 1792, there was a body of law, already ancient, to support the personal and subject matter jurisdiction of courts over sovereigns.

If any doubt about that jurisdiction could survive **Chisholm v. Georgia**, it should have perished in 1812 after the Supreme Court decision of **The Schooner Exchange v. McFaddon**, 11 U.S. (7 Cranch) 116, 137 (1812). In that case, the Supreme Court clearly espoused a restrictive theory of sovereign immunity, and moreover found that foreign states may be sued for their commercial acts, a finding that comports nicely with the sentiments expressed a century and a half later in the Tate Letter, 26 Dept. State Bull. 678 (1982).

For a correct judicial interpretation of the **Schooner Exchange** decision, we need only look as far as **New England, Etc. v. Iran Power, Etc.**, 502 F. Supp. 120 (1980), affrmd. 646 F.2d 779. There the Court, in denying that there is now or ever was the right of a foreign state to demand sovereign immunity, said:

> It is not now nor has it ever been a right enjoyed by one sovereign within the territorial jurisdiction of another. **The Schooner Exchange v. McFaddon**, 11 U.S. (7 Cranch) 116 (1812).

In the case at bar, the District Court and the Appeals Court found that China did enjoy the right to absolute sovereign immunity from suit in 1911, and that this right was so firmly established that it was part of the contract with the bondholders. The Court quoted **The Schooner Exchange** as authority for this finding, a finding diametrically opposed to the Court's opinion in **New England, Etc.**, supra. The eleventh Circuit panel, in **Jackson v. P.R.C.**, 794 F.2d 1490, July 25, 1986, admitted that "Under our law foreign sovereign immunity is a matter of grace and comity on the part of the United States and is not a restriction imposed by the Constitution itself." Nevertheless, it managed to transform this grace and comity into an absolute right when it said, "It would be manifestly unfair for the United States to modify the immunity afforded a foreign state in 1911 by the enactment of a statute nearly three quarters of a Century later."

Chief Justice Marshall delivered the opinion of the Court, in the **Schooner Exchange** case. There he wrote that the jurisdiction of the United States within its own territory is exclusive and absolute, susceptible to no limitation not imposed by itself and with all exceptions to that jurisdiction being traced to the consent of the United States, express or implied. The Court found that the United States, like all civilized nations, had impliedly consented to three exceptions to its jurisdiction, (1) "the exemption of the person of the sovereign from arrest or detention within a foreign territory," (2) "the immunity which all civilized nations allow to foreign ministers," and (3) the immunity allowed to foreign armies and navies when the United States "allows the troops of a foreign prince to pass through his dominions." The Court further found that the United States, by permitting her ports to remain open to the public ships of friendly foreign powers, had impliedly consented to the third exception to its jurisdiction in the case of Napoleon's warship. The Court expressly did not find, as China and the Eleventh Circuit erroneously contend

that it found, that foreign nations enjoy absolute immunity from jurisdiction in all cases and for all acts. The Court found that the United States had consented to withhold jurisdiction over the **person** of the foreign sovereign, the **person** and **allegance** of his ministers, the **allegance** and **command** of his armed forces, and the **property** of his friendly warships. The only property allowed the immunity was armed public vessels, and a clear distinction was drawn between that property and other property belonging to the foreign sovereign. The Chief Justice wrote, at page 145, that:

> . . . there is a manifest distinction between the private property of a person who happens to be a prince, and the military force which supports the sovereign power, and maintains the dignity and the independence of a nation. A prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territitorial jurisdiction; he may be considered as so far laying down the prince, and assuming the character of a private individual; but this he cannot be presumed to do with respect to any portion of that armed force which upholds his crown, and the nation he is entrusted to govern.

The **Schooner Exchange**, therefore, stands for the proposition and accepted law that sovereign immunity is to be accorded in restricted circumstances, i.e., in cases involving the person of a head of state, the ministers of that state, and the invited (or at least assented to) armed forces and military vessels of a foreign state. The reasoning in that case does not advance any "absolute" immunity to foreign states, even in these three well reasoned exceptions. On the contrary, the **Schooner Exchange** teaches that sovereign immunity is quite restricted and always subject to the consent of the domestic sovereign, consent which may be withdrawn at its pleasure. The United States, in enacting the F.S.I.A., was (properly) careful not to withdraw any of those three assented to exceptions to the general principal that foreign sovereigns are subject to suit in the ordinary tribunals of this country. The findings of law in the **Schooner Exchange** case remain undisturbed by the enactment of the F.S.I.A., since those

exceptions to jurisdiction (and attachment) still exist. The notion that the **Schooner Exchange** overrules the F.S.I.A. in pre-1977 and/or pre-1952 cases overlooks the obvious fact that the F.S.I.A. and the **Schooner Exchange** are in perfect harmony.

Even these three well accepted exceptions are not chisled in stone. The Chief Justice wrote, at page 146, that, "Without doubt, the sovereign of the place is capable of destroying this implication. He may claim and exercise jurisdiction either by employing force, or by subjecting such vessels to the ordinary tribunals."

Perhaps no clearer refutation of the lack of "immunity" on the part of China in 1911 exists than that expressed in **The Schooner Exchange** on page 123, Dallas writing:

> . . . nor do we deny the obligation of a foreign sovereign to conform to pre-existing laws, as to offenses, and as to the acquisition of property; **nor his liability for his private debts and contracts**. Vattel, 426; B. 2, c. 18, sect. 340, 344, 346. **So, if a sovereign descends from the throne and becomes a merchant, he submits to the law of the country**. (emphasis added).

Judge Hare went on to explain, on p. 126 and 127, that:

> The general rule is that all sovereignty is strictly local, and cannot be exercised beyond the territorial limits. This flows from the nature of sovereignty, which being supreme power, cannot exist where it is not supreme. **4 Cranch, 279, Rose v. Himely**. There is no instance of its actual extra-territorial operation, except where by fiction of law it is supposed to be territorial; or at most where it exclusively operates upon its own subjects.

and, later on p. 127:

> The general principle then being in our favor, our adversaries must show the exception. **Whatever is within the extent of a country is within the authority of its sovereign; and if any dispute arises concerning the effects within the country or passing through it, it must be decided by the judge of the place. Vat. 446.** Unless the case now before the

> court be an exception, this rule is universal. It grows out of the first principles of government, which, in giving security assumes **jurisdiction**. (emphasis added)

Further authority, both Constitutional and under prior internation law, quoted in 1812 against the allegations of absolute sovereign immunity for foreign sovereigns within the United States, appears three pages later on p. 130:

> Bynkershoek upon Ambassodors (40 to 46) expressly states that the property of the sovereign, **public and private**, is subject to the authority of the judge of the place. **2 Rutherford, 476, 382**. The case of the Swedish convoy is also an authority to the same effect. **The Constitution of the United States, art. 3, sect. 2, expressly gives the courts of the United States jurisdiction in cases between citizens and foreign states**. (emphasis added)

Even the exception found by the Supreme Court to apply to the **Schooner Exchange** case is modern; she was Napoleon's warship on a military voyage visiting a port of the United States open to her reception upon standing invitation of the sovereign power of the United States. She was here because of a sovereign act and considered part of the territory of Napoleon "by fiction of law." Or to quote the Supreme Court "But in the present case he (referring to Napoleon) appears in his sovereign character".

In addition, there are at least two twentieth century pre-1952 cases showing no "absolute sovereign immunity," **Ex Parte Peru**, 318 U.S. 578, 87 L. Ed. 1014 (1943) and **Mexico v. Hoffman**, 324 U.S. 30, 89 L. Ed. 729 (1945).

In 1976, the Supreme Court, in **Alfred Dunhill of London v. Republic of Cuba**, 96 S. Ct. 1854, 425 U.S. 682, 48 L. Ed. 2d 301, found that, at note 12, "... repudiation by a sovereign of a commercial debt is not an act of state ..." The Court gave the following reason for its decision, on p. 1863:

> The major underpinning of the act of state doctrine is the policy of fore-closing court adjudication involving the legality of acts of foreign states **on their own soil** that might embarrass the Executive Branch of **our**

> Government in the conduct of our foreign relations. (emphasis added)

and

> . . . we fear that embarrassment and conflict would more likely ensue if we were to require that the repudiation of a foreign government's debt arising from its operation of a purely commercial business be recognized as an act of state and immunized from question in our courts.

In **National City Bank of New York v. Republic of China**, 348 U.S. 356, 75 S. Ct. 423 (1955), the Supreme Court found no "absolute" sovereign immunity. There, eleven years before the enactment of the Foreign Sovereign Immunities Act of 1976, it found that:

> The freedom of a foreign sovereign from being haled into court as a defendant has impressive title-deeds .... (T)he priviledged position of a foreign state is not an explicit command of the Constitution. It rests on considerations of policy given legal sanction by this Court.

and, discussing sovereign immunity from suit in our courts, noted:

> It is recognized that a counterclaim based on the subject matter of a sovereign's suit is allowed to cut into the doctrine of immunity. This is proof positive that the doctine is not absolute, and that considerations of fair play must be taken into account in its application.

There the Supreme Court found no immunity, and allowed the bank to countersue China on China's defaulted Treasury Notes. As precedent for its finding of no immunity, the Court quoted, in note 14, the case of **King of Spain v. Oliver**, C.C.D.Pa., 14 Fed. Cas. page 572, No. 7, 813, 1 Pet. C.C. 276. There the Supreme Court found that:

> Let it be, as was argued, that the consent of the Spanish government, under the administration of Joseph (Bonaparte, who had, while in power, agreed that the duties be applied to reduce the debt) was invalid and no obligation upon Ferdinand; still, Ferdinand, **as the successor of his father** (Charles IV, to whom the loan

> had been made), and the nation, were and are bound to pay the debt due in Holland.

In the **National City Bank** case, *Justices Reed, Burton, and* Clark dissented, noting that:

> Furthermore, the Chinese Government Treasury Note and its 36th Year Short Term Treasury Notes are sovereign obligations, **jure impereii** in form, of the highest public character. Consequently, the attitude of the Department of State as to the disirability of relaxing the strict, rule of immunity as to acts of commerce, **jure gestionis**, is inapplicable . . . If the foregoing statements of law are sound, the Republic of China as a foreign sovereign is free from direct suits in our courts on the notes here in question **unless the Congress of the United States has enacted a statute that restricts its immunity. This it has not done**. (emphasis added)

Thus, even the dissenters agree that a foreign sovereign may be held accountable for its debts, even when those debts are of the highest public character, after such time as Congress enacts a statute that restricts immunity. These Treasury notes were pledged in 1920 (see note 1), not long after the bearer bonds at issue in the instant suit were issued, so such a legislative enactment as contemplated by Justices Reed, Burton, and Clark obviously would apply to very old debts.

In 1976, by means of the F.S.I.A., the Congress did enact such restrictions to foreign sovereign immunity. Congress must have been aware of the comments of Justices Reed, Burton, and Clark in the **National City Bank** case that such an enactment would apply to old debts and, accordingly, must have concurred in such "retroactive" application or else it would have explicitely excluded such old debts from the F.S.I.A.

In the early twentieth century China had no reasonable reason to expect that it would enjoy absolute sovereign immunity protection from the jurisdiction of courts of the United States. China may have known that she could apply to the Department of State requesting that the executive make a suggestion of immunity to the courts but she had no right to force the executive to make the suggestion and no right to force

the judiciary to accept the suggestion. Indeed, throughout the nineteenth and early twentieth centuries, the courts resisted executive suggestions of sovereign immunity, Jerrold L. Mallory, "Resolving the Confusion Over Head of State Immunity: The Defined Rights of Kings," Columbia Law Review, 86:169 (1986) at page 180. In 1918, Secretary of State Lansing expressed a restrictive theory of sovereign immunity when he wrote in a letter, dated November 8, 1918, to the Attorney General that, "(w)here (government owned) vessels were engaged in commercial pursuits, they should be subject to the obligations and restrictions of trade, if they were to enjoy its benefits and profits." 2 G. Hackworth, **Dig. Int'l L.** 429 (1941). It was not until 1938, long after China had sold the bonds here complained of, that the Supreme Court first began to accord weight to executive suggestions of sovereign immunity, **Compania Espanola De Navegacion Maritima, S.A. v. Navemar**, 303 U.S. 68 (1938). It was not until 1926, over a decade after China sold her bonds, that the Supreme Court widened the sovereign immunity protection accorded warships of friendly powers under **The Schooner Exchange** decision to include trading ships owned and operated by foreign governments, **Berizzi Bros. v. S. S. Pesaro**, 271 U.S. 562, 46 S. Ct. 611 (1926). In the **Schooner Exchange** decision Judge Hare found generally, at page 130, that, "The Constitution of the United States, art. 3, sect 2, expressly gives the courts of the United States jurisdiction in cases between citizens and foreign states," but the Court found an exception in the case of warships of a friendly power visiting our open ports. In **Berizzi Bros.** the Supreme Court expanded that exception to include trading ships but did not widen the exception further. Although after 1812 the warship exception was "absolute" (and remains absolute) and after 1926 the trading ship exception was "absolute" (at least until 1945, when the Supreme Court overruled **Berizzi Bros.** in its decision in **Mexico v. Hoffman**, 324 U.S. 30 at 35, n. 1), no foreign state or sovereign has ever enjoyed "absolute" immunity for all her acts. Absolute sovereign immunity from the jurisdiction of our courts, (except in the case of the person of sovereigns and their ministers, their armies, and their friendly warships and, for a nineteen year period of time, their trading

ships) never existed in the United States until 1976, when the enactment of the F.S.I.A. granted such immunity to foreign sovereigns, albeit with several important exceptions. Any immunity extended to foreign sovereigns is "a matter of grace and comity on the part of the United States," **Verlinden v. Central Bank of Nigeria**, 461 U.S. 480, 76 L. Ed. 2d 81, 103 S. Ct. 1962 (1983).

Not only could China in 1911 not have expected to receive the protection of sovereign immunity for a default on her foreign debt, she could reasonably have expected to receive an armed invasion from the United States and the European Powers should she default on those obligations. She remembered that in 1904 the Dominican Republic had threatened to default on $32 million in loans, leading President Theodore Roosevelt to dispatch troops which took over that Caribbean nation's customs services and diverted 55 percent of duties collected to the repayment of debts. She remembered that during the era of dollar diplomacy Theodore Roosevelt sent the Marines into other nations as well, explaining that, "If a nation keeps order **and pays its obligations** it need fear no interference from the United States." "Chronic wrongdoing," he warned, would lead to "intervention by some civilized nations." See Wall Street Journal, 12 January 1984.

In the nineteenth century Ismail, pasha of Egypt, defaulted on his nation's European bonds. England and France sent a commission to oversee the Egyptian economy. The pasha resisted, so England and France acted; they dispatched troops to storm the pasha's palace. For the next 30 years, England and France diverted a large part of Egypt's tax revenues to the repayment of debt. In 1881, a group of European powers took over Turkey and forced her to put her revenues into receivership. The Europeans, through their debt commission, ran Turkey for the next 25 years. In 1892, France dispatched a battleship to Santo Domingo to support the French-owned national bank there. At the turn of the century, England, Italy, and Germany used force against Venezuela. See Wall Street Journal, supra.

It was not until the 1930's, with President Franklin D. Roosevelt's establishment of the Foreign Bondholders

Protective Council, that the United States began to look for peaceful resolutions when foreign states defaulted on their foreign debt. It was not until that time that China defaulted on her foreign debts.

## II.
## The Eleventh Circuit Has Decided An Important Question of Federal Law, The Application of The Foreign Sovereign Immunities Act of 1976, Wrongly and In Conflict with the Decisions of This Court and Other Circuits.

### a. Other Courts Have Found The F.S.I.A. To Be The Basis For Jurisdiction, Even When The Events Complained of Occurred Prior To 1952.

The Eleventh Circuit Court panel found no cases in which the F.S.I.A. was the basis of jurisdiction for any case concerning any events that predated 1952 (the date of the Tate Letter). That panel overlooked at least three such cases.

**Schmidt v. Polish People's Republic**, 579 F. Supp. 23 (S.D.N.Y. 1984), affirmed 742 F. 2d 67 (CA2 1984) involves a 1926 debt and a 1939 default by Poland on its Treasury notes. The F.S.I.A. was the basis of jurisdiction. The court also found on p. 27:

> The Court is also convinced that if plaintiff's allegations are true, their cause of action is based on acts sufficiently connected to the United States **to deprive defendant of sovereign immunity** under Sec. 1605(a)(2)... Even were the Court to conclude that all defendant's commercial activity and the specific acts connected to it took place in Poland, **defendant would still lose its sovereign immunity** under clause (3), as Poland's default on its Treasury notes had a "direct effect in the United States." (emphasis added)

The Court concluded that Poland knew in 1926 that litigation was a forseeable event. It wrote on p. 28:

> By engaging in such a transaction, defendant availed itself of the privileges of American Law, and litigation in this country should have been forseeable to it in the event that it failed to meet its obligations.

**Von Dardel et al. v. U.S.S.R.**, 623 F. Supp. 246, (D.D.C. 1985), ruled in favor of the plaintiffs for the wrongful acts of defendant U.S.S.R. in 1945 (the unlawful seizure, detention, and possibly death of Raoul Wallenberg, a Swedish diplomat). The F.S.I.A. was the basis for jurisdiction. This in spite of the fact that all acts of the U.S.S.R. took place within their own territorial jurisdiction annexed in eastern Europe and the Soviet Union. The only nexus with the United States was the honorary citizenship granted to Raoul Wallenberg many years later.

In **Associacion de Reclamantes v. The United Mexican States**, 735 F. 2d 1517 (D.C. Cir. 1984), Judge Scalia found that the F.S.I.A. granted immunity to Mexico for a tort commited by Mexico in 1941. There Judge Scalia found that:

> The Act sets forth as the general rule that "a foreign state shall be immune from the jurisdiction of the courts of the United States," 28 U.S.C. Section 1604; and then creates exceptions to that immunity for specific categories of cases.

Since the plaintiffs-appellants could not prove any exception to the immunity granted by the F.S.I.A., Mexico prevailed in that case. It is important to note that Judge Scalia did not find Mexico to be immune because of its expectation in 1941 that it then had absolute sovereign immunity or because international law granted Mexico absolute sovereign immunity, Judge Scalia ruled as he did because the F.S.I.A. "retroactively" granted Mexico immunity for her 1941 acts.

> b. It Is Not Retroactive Application of Law To Apply The F.S.I.A. To The Instant Suit.

The judicial panel cites **Corporation Venezolano de Fomento v. Vintero Sales**, 629 F. 2d 786 (2d Cir) **cert. denied** 449 U.S. 1080, 101 S. Ct. 863, 66 L. Ed. 2d 804 (1980) as the "leading case" on the issue of retroactivity of the F.S.I.A. In that case, clearly distinguished from both the instant suit and from **Jackson v. P.R.C.**, the F.S.I.A. was held not to apply to a suit **filed before** the enactment of the F.S.I.A. Of course, the F.S.I.A. does not apply to a suit filed **before** its enactment! The Act clearly states that it applies to **all** suits filed **after** its

enactment. Both the instant suit and **Jackson v. P.R.C.** were filed **after** the enactment of the F.S.I.A.

The court, in **Coroporacion Venezolana de Fomento v. Vintero Sales**, at page 791, considered the jurisdictional application of the F.S.I.A. thusly, ". . . jurisdiction is determined at the time of the commencement of suit." There the court found absence of F.S.I.A. jurisdiction because the suit was filed before the effective date of the F.S.I.A. The court wrote, on page 790:

> The sole difficulty with the invocation of the FSIA as a basis for jurisdiction is CVF's argument that the Act was not meant to confer jursidiction in cases **pending** at the time the Act became law. (emphasis added)

The alert reader will note that the court found that the date suit was filed, and not the date of the events complained of, is the proper date to be considered in deciding whether or not the F.S.I.A. confers jurisdiction. In that case, had the fact that the events complained of occurred before the enactment of the F.S.I.A. posed an additional jurisdictional problem, the too early date of filing of suit would not have been the "sole difficulty" with the invocation of the F.S.I.A. as a basis for jurisdiction.

The only case cited by the judicial panel in which F.S.I.A. jurisdiction was found wanting in a case filed after 1976 was **Slade v. The United States of Mexico**, 617 F. Supp. 351. That case cited **Jackson v. P.R.C.** as precedent; for the judicial panel to cite **Slade v. Mexico** as precident **Jackson v. P.R.C.** is circular reasoning, it amounts to citing **Jackson v. P.R.C.** as precedent for itself.

But, of course, subject matter jurisdiction for pre-1952 events based upon the F.S.I.A. is not a retroactive application of law, so long as suit is filed after the effective date. To arrive at the conclusion that it was retroactive application of law the judicial panel overlooked the distinction between the obligation of a contract and the *remedy* for breach of that *obligation*, a distinction clearly pointed out by the Supreme Court at least twice, in **Sturges v. Crowninshield** 17 U.S. (4 Wheat) 122 at 200, 4 L. Ed. 529 at 550 and again in **Home Building and Loan Association v. Blaisdale**, 54 S. Ct. 231

at 237, 290 U.S. 390 at 430. Citing **Sturges**, the Supreme Court in **Home Building** said:

> Chief Justice Marshall pointed out the distinction between the obligation and the remedy (citation). Said he; "The distinction between the obligation of a contract, and the remedy given by the legislature to enforce that obligation has been taken at the bar, and exists in the nature of things. Without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation shall direct . . . ."

Also in **Home Building** the Supreme Court said, in explanation for its holding that to be read into every contract is the recognition that the sovereign power of the Legislature allows it to modify the remedy for breach of contract long after the contract is entered into, even if the modification of the remedy is so extreme as to modify or even abrogate the contract, all without disturbing the obligations of the contract:

> It does not matter that legislation appropriate to that end "has the result of modifying or abrogating contracts already in effect." (citation omitted) Not only are existing laws read into contracts in order to fix obligations between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as postulate of the legal order.

By the term "sovereign power" the Supreme Court refers to power of the domestic legislature, not to a foreign potentate, as the District Court here and in **Jackson v. P.R.C.**, misunderstood.

Thus, even in the absence of the Constitutional grant of jurisdiction for suits between citizens of the U.S. and foreign states, even in the absence of the Supreme Court's findings in **Chisholm v. Georgia** and in the **Schooner Exchange** that states, both domestic and foreign, enjoyed no immunity from civil suit on account of their "sovereignty", even in the absence of all the twentieth century decisions denying sovereign immunity for commercial acts, even in the absence of the Tate Letter, and even if China had enjoyed absolute sovereign immunity, the F.S.I.A. would be enough to confer jurisdiction

over "contracts already in effect," since the F.S.I.A. only modifies the *remedy* (the *obligation* under the contract, the obligation of China to pay what she promised, remains undisturbed), a permissible modification allowed the Legislature under **Sturges** and **Home Building**. To hold otherwise would impair the power of Congress to enact laws, and unconstitutional impairment. Besides, the F.S.I.A. doesn't modify the remedy for breach of contract very much, it establishes a procedure for serving the foreign state with the summons and complaint but is not nearly so extreme as the modification of the remedy in **Home Building**.

**Northwestern Fertilizer Co. v. Hyde Park**, 97 U.S. 659 (1878), discussed by Richard A. Epstein, James Parker Hall Professor of Law, University of Chicago in his book **Takings, Private Property and the Power Eminent Domain**, Harvard University Press, provides an example of legislative destruction of antecedent rights (a power that the judicial panel says does not exist). In that case, the Illinois General Assembly, by enactment, granted to Northwestern Fertilizer Co. authorization to build in south Chicago "chemical and other works" for the rendering of "dead animals and other animal matter." In accordance with the express terms of the grant, the company built its works in "swampy and nearly inhabitable" ground, ground which later became Hyde Park. The legislature of Hyde Park then passed an ordinance prohibiting the collection and transfer of dead animals and animal matter into or through Hyde Park. The Supreme Court held that nothing in the grant prevented Hyde Park from insisting that the plant relocate even after construction was complete and the plant was in operation. It decided that the collection depots already in place could be closed down, thereby forcing the company to abandon its rail network for costly and untried alternatives. The court ignored the language of the charter relied upon by the fertilizer company.

Professor Epstein disagrees with this Supreme Court decision because no just compensation was paid to the fertilizer company. On page 150 of **Takings** he states:

> . . . outright grants of the fee made by the state may be undone, but only under the eminent domain power,

**unless there is a reservation in the original grant.** (emphasis added)

By this Supreme Court decision, the Congress may destroy a "right" enjoyed by China in 1911, even if that "right" rises to the level of an antecedent statutory grant. But, of course, China's expections of soveriegn immunity from suit for failure to perform on the bonds (of course, she had no such expectations in 1911) does not rise to the level of a "right," so Professor Epstein's exception to the finding in **Northwestern Fertilizer** would not help China (any comity given to China by the United States in 1911 was subject to reservation; the reservation of the power of the United States to alter its own legislation, rules, procedures, and concepts of law within its own borders).

c. The Courts Should Apply The F.S.I.A., Even If It Does Amount To Retroactive Application of Law

It is settled law that an appellate court must apply the law in effect at the time it renders its decision, **Thorpe v. Housing Authority of City of Durham**, 393 U.S. 268, 89 S. Ct. 518 (1969). Indeed, even if the change in law occurs between the time of the lower court decision and the appellate decision, the appellate court must apply the changed law, **Thorpe**, supra, **Ziffrin, Inc, v. United States**, 318 U.S. 73, 78, 63 S. Ct. 465, 469, 87 L. Ed. 621 (1943). This general rule must have been known to China in the early twentieth century; it was enunciated by the Supreme Court as long ago as 1801 in the case of **United States v. Schooner Peggy**, 1 Cranch 103, 110, 2 L. Ed. 49 (1801). Surely, if an appellate court must follow new law enacted after the decision of the lower court, an appellate court must follow new law enacted before a case was even filed.

Although neither this case at bar nor **Jackson v. P.R.C.** involves retroactive application of law, the judicial panel's findings would be in error even if retroactive application of law was the issue. The Supreme Court has changed its thinking on the subject of retroactive legislation. "The orientation of the current law is now quite extreme, as virtually all retroactive legislation on economic matters is routinely sustained by the Supreme Court," Epstein, **Takings**, p. 256. In **Usery v.**

**Turner-Elkhorn Mining Co.**, 428 U.S. 1 (1975), the Supreme Court found that Congress has virtually plenary powers on matters of economic regulation, including power to enact retroactive legislation.

The Courts, in **National American Corp. v. Federal Republic of Nigeria**, D.C.N.Y. 1978, 448 F. Supp. 622, affirmed 597 F. 2d 314, **Texas Trading & Milling Corporation v. Republic of Nigeria**, 647 F. 2d 300 (2nd Cir. 1981), and in **Ohntrup v. Firearm Center, Inc.**, 516 F. Supp. 1281 found that the F.S.I.A. applied retroactively to afford plaintiffs basis for jurisdiction over foreign sovereign defendants. In all three of these cases, all events complained of happened prior to the enactment of the F.S.I.A. Suit was filed under the Act and the courts denied immunity to the foreign sovereign defendants because of the first and/or third clauses of section 1605(a)(2).

The United States Supreme Court has considered retroactive application of grants of jurisdiction and has ruled favorably, and in doing so has ruled on the subject of prospective application of grants of jurisdiction where the facts occurred prior to the grant of jurisdiction. This Court, in **Andrus v. Charleston Stone Prods. Co., Inc.**, 98 S. Ct. 2002, 436 U.S. 604, n. 6 ruled that the Congressional elimination of the amounts-in-controversy requirement with regard to actions brought against the United States or its agencies, officers, or employees served to confer jurisdiction in pending cases originally filed under an invalid theory of jurisdiction. In reaching that decision, the Supreme Court quoted as authority **Green v. Philbrook**, 427 F. Supp. 834 (Vermont, 1977). In **Green**, the District Court allowed an application of a grant of jurisdiction at the time suit was originally filed. In that case, Congressional action saved a lawsuit that otherwise would have been dismissed for lack of subject matter jurisdiction. In **Green**, the Court said:

> Thus, we think it proper to apply the amendment retroactively to grant jurisdiction over the defendant Secretary of Health, Education and Welfare, even if there was no jurisdiction initially (citation omitted). In any event, were we to dismiss against the federal defendant

> now, **the plaintiffs would be able to renew their action by refiling under the amended statute.** (emphasis added)

Thus, in **Andrus** and in **Green** the Courts have extended jurisdiction to cases much more problematical than the instant case, cases in which suit was filed before the effective date of the statute granting jurisdiction. It is immaterial for the instant case whether or not the F.S.I.A. can be similarly applied in cases filed before its effective date; petitioner's point in quoting these two cases is the general principle, accepted by both the Vermont District Court and the United States Supreme Court (quoted in the emphasized sentence fragment above), that plaintiffs may in any event file suit after a new grant of jurisdiction in cases in which the events complained of occurred prior to the enactment of the jurisdictional statute.

The Eleventh Circuit stated that it examined the legislative history of the F.S.I.A. and found no support there for retroactive application. Such finding was both erroneous and irrelevant.

The F.S.I.A. clearly states that, "Claims of foreign states to immunity should *henceforth* be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter," 28 U.S.C. Section 1602. The legislative history of a statute may arguably be consulted to refute the clear meaning of legislative language only if that history clearly shows that the legislators intended another meaning; the absence of support to the clear language of a statute means nothing unless some language can be found supporting the opposite proposition.

The legislative history, published at U.S. Code Cong. and Ad. News., 6604 through 6635, House Report No. 94-1487 and Senate Report No. 94-1310, clearly does provide unambiguous support for application of the F.S.I.A. to suits like the instant suit, suits filed after the effective date of the Act concerning events occurring prior to 1952, because the Act clearly applies to **all** suits filed after its effective date, regardless of the dates of the events complained of. That history states:

The purpose of the proposed legislation, as amended, is to provide when and how parties can maintain a lawsuit against a foreign state or its entities in the courts of the United States and or provide when a foreign state is entitled to sovereign immunity. (at page 6604)

Moreover, both a sale of bonds to the public and a direct loan from a U.S. commercial bank to a foreign government are activities which are of a commercial nature and should be treated like other similar commercial transactions. Such commercial activities would not otherwise rise to immunity and would be subject to U.S. regulation, such as that provided by the securities laws. (at page 6609)

This bill, entitled the "Foreign Sovereign Immunities Act of 1976," sets forth the **sole and exclusive** standards to be used in resolving questions of sovereign immunity raised by foreign states before Federal and State courts in the United States. It is intended to **preempt** any other State or Federal law (excluding applicable international agreements) for according immunity to foreign sovereigns, their political subdivisions, their agencies, and their instrumentalities. (at page 6610, emphasis added)

Aside from setting forth **comprehensive** rules governing sovereign immunity, the bill prescribes: the jurisdiction of U.S. district courts in cases involving foreign states . . . . (at page 6610, emphasis added)

Section 1330 provides a **comprehensive** scheme in cases involving foreign states. (at page 6611, emphasis added)

The jurisdiction extends to **any claim** with respect to which the foreign state is not entitled to immunity under sections 1605-1607 proposed in the bill, or under any applicable international agreement of the type contemplated by the proposed section 1604. (at page 6611, emphasis added)

Under existing law, the district courts have diversity jurisdiction in actions in which foreign states are parties,

> but only where the amount in controversy exceeds $10,000. 28 U.S.C. 1332(a)(2) and (3). (at page 6612)
>
> Section 4 of the bill adds a new chapter 97 to title 28, United States Code, which sets forth the legal standards under which Federal and State courts would **henceforth** determine **all claims** of sovereign immunity .... (at page 6613, emphasis added)
>
> Section 1604 would be the **only** basis under which a foreign state could claim immunity from the jurisdiction of a Federal or State Court in the United States. (at page 6616, emphasis added)
>
> Indeed, the enactment of the bill will result in a net saving, in an undetermined amount, in that the Department of State **will no longer** have to undertake a consideration of diplomatic requests for sovereign immunity, and the Department of Justice **will not be** required to appear in court in support of the suggestions of immunity that are filed persuant to the Department of State's sovereign immunity determinations. (at page 6632, emphasis added)

Thus clearly, the legislative history shows that the Act was intended to apply to **any** and **all** claims of sovereign immunity, that it was to be the sole and exclusive standard of such determinations, **preempting** earlier law, and that the scheme of the Act was to be **comprehensive**. The Departments of State and Justice were intended to be completely removed from the picture. Moreover, Congress expressly intended that foreign government bonds to be covered under the Act. Additionally, the legistlative history states that the U.S. district courts already had diversity jurisdiction over foreign sovereigns for claims that exceeded $10,000.

## III.

## The Decisions of The District Court And The Eleventh Circuit Violate The Eminent Domain Clause of The Constitution of The United States.

Both the district court and the appellate panel relied heavily upon the impact of its rulings upon the interests of the United

States. To allow these interests to affect its rulings brings into effect the eminent domain clause of the Constitution, since the bondholders have a property right in their cause of action against the foreign sovereign. For the United States to take this property right in protection of the interests of the nation as a whole is permissible under the Constitution only when just compensation is paid. Since no compensation whatsoever has beed paid to the bondholders, either by China or by the United States, the taking of these property rights by the expediency of the refusal of the judiciary to take the jurisdiction imposed upon it by the F.S.I.A. and by Article III, section 2 of the Constitution, the United States must either pay just compensation to the bondholders or restore their property rights in these bonds.

## IV.

## The Executive Branch of Government Has Exceeded Its Constitutional Authority, And The Courts Have Wrongfully Yielded To That Exceeded Authority.

The first time that any Federal Court failed to find subject matter jurisdiction under the F.S.I.A. (other than cases filed before the effective date of the act) was in **Jackson v. P.R.C.**, supra. That finding occurred only after the Justice Department made an appearance in behalf of the Peoples' Republic of China, an appearance during which it requested that the court vacate the judgement against the P.R.C. Following that Justice Department appearance, the District Court reversed itself and found no subject matter jurisdiction. Such a reversed finding was a transparent yielding to the powers of the executive branch of government. The Constitutional grant of executive power, however, does not include power to nullify congressional actions, **Sioux Valley Empire Elec. Ass'n. Inc. v. Butz**, D.C.S.D. 1973, 367 F. Supp. 686, Affirmed 504 F. 2d 168. Neither need nor national emergency will justify exercise of power by executive not inherent in his office, **Yoshida Intern., Inc. v. U.S.**, 1974, 378 F. Supp. 1155, 73 Cust. Ct. 1, C.D. 4550, reversed on other grounds 526 F. 2d 560, 63 CCPA 15. Although the executive has the power to grant pardons for crimes against the United States, that power does not extend to civil suits, **Halperin v. Kissinger**, 1979, 606 F.

2d 1192, 196 U.S. App. D.C. 285, affirmed in part, certiorari dismissed in part, 101 S. Ct. 3132, 452 U.S. 713, rehearing denied 102 S. Ct. 892, 453 U.S. 928. The only other executive power that might apply to the application of sovereign immunity is the treaty making power of the president, with the advice and consent of the senate, but no treaty immunizing China had been even proposed.

## V.

## The Eleventh Circuit, In The Absence of Any Evidence Whatsoever, Erroneously Found That China Had Not Extended The Hukuang Railways Bonds, Ignoring Strong Evidence To The Contrary.

The judicial panel also found, erroneously, that China had not extended the due date of the Hukuang bonds from 1951 to 1976. Those negotiations and extension are found in **Foreign Relations of the United States, Diplomatic Papers**, 1935 vol. III, Dept. State Pub. 5068, p. 762-767, 1936 vol. IV, Dept. State Pub. 5404, p. 574-601, 1937 vol. IV, Dept. State Pub. 5545, p. 662-677. Further authority for the extension of the Hukuang bonds is found in **Moody's International Manual**, under the section on China listing outstanding bonds, "21. Railway Sinking Fund 5s of June 15, 1911 (Hukuang Railways) due June 15, 1975, (extended from June 15, 1951)."

In **Jackson v. P.R.C.** the lower and appellate courts made that erroneous finding without a hearing on the matter and without allowing plaintiffs any opportunity for discovery of the issue. In the instant case, petitioner, unlike the plaintiffs in **Jackson v. P.R.C.**, alleged in his complaint that China had, in addition to the specific extension of the due date of the Hukuang bonds, indefinitely extended her liability for all her foreign bonds by her 1947 unconditional promise to pay coupled with a statement of inability then to pay her foreign debt. Since it is the general rule that a party's allegations in the pleadings are to be construed to be true, in the absence of clear evidence to the contrary, for purposes of summary judgement, the judicial panel should not have found in the instant suit that China had not extended the Hukuang bonds, irrespective of the courts findings in **Jackson v. P.R.C.**, unless the courts could

claim clear evidence that China had neither specifically extended the Hukuang bonds nor generally extended her liability for all her foreign debt. The records in both cases are devoid of any evidence tending to show that China did not so extend her liability.

## VI.
## THE ELEVENTH CIRCUIT HAS VIOLATED THE DUE PROCESS CLAUSE OF THE CONSTITUTION WITH RESPECT TO THE LUNG-TSING-U-HAI RAILWAY GOLD LOAN OF 1913 BONDS

In **Jackson v. P.R.C.** the Eleventh Circuit found that the F.S.I.A. did not confer jurisdiction because all events concerning the Hukuang Railway bonds were completed prior to 1952, the date of the Tate Letter. Even if the F.S.I.A. cannot confer jurisdiction if the events complained of occurred prior to 1977, the effective date of the Act, that Act confers jurisdiction over the Lung-Tsing-U-Hai Railway Gold Loan of 1913 since that loan was due in 1982, five years after the effective date of the legislation. Although the court may have rejected the specific extension of the Hukuang bonds and the 1947 promise of Chaing Kai-Chek to extend payment of all China's foreign debt, the court did not consider the specific extension of the Lung-Tsing-U-Hai bonds of 1913 to the year 1982. Plaintiff alleged that extension and that extension is recognized by **Moody's International Manual**. The defendant foreign government did not offer any evidence tending to show that the extension did not occur. Although the courts of the United States have great power to dismiss or grant summary judgements, that power does not include the power to summarily dismiss an allegation without considering it, especially when, as in this case, that allegation comports with the court's own reasoning as to the necessary conditions precedent for suit to proceed.

In addition, due process issues are particularily salient for all the bond issues, both in this case and in **Jackson v. P.R.C.**, where a grant of immunity deprives citizens of States of the United States access to courts to resolve disputes arising from commercial matters. See Mallory, supra, at page 185.

## CONCLUSION

The writ should be granted.

Respectfully submitted,

John H. Lary, Jr., Petitioner
600 St. Clair Street S.W.
Huntsville, Alabama 35801
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# APPENDIX

## APPENDIX A

## IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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No. 85-7613
Non-Argument Calendar

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JOHN H. LARY, JR.,

*Plaintiff-Appellant,*

versus

THE REPUBLIC OF CHINA,
a foreign government,

*Defendant-Appellee.*

---

Appeal from the United States District Court
for the Northern District of Alabama

---

(August 22, 1986)

Before FAY, JOHNSON and CLARK, Circuit Judges.
PER CURIAM:

Appellant John Lary brings this appeal from the district court's dismissal of this case for lack of subject matter jurisdiction. Appellant brought suit against appellee Repubilc of China for default on certain railway bonds issued by the Appellee government and its predecessor. As the district court properly noted, appellant's action is barred by the doctrine of absolute sovereign immunity. Any change in this doctrine wrought by passage of the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1602 et seq., is irrelevant to the action at hand since the FSIA does not apply retroactively to events or transactions occurring before its date of passage. **See Jackson v. People's Republic of China**, No. 84-7744, slip op. at 4558 (11th Cir. July 25, 1986). This district court order is therefore

AFFIRMED.

## APPENDIX B

## IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA NORTHEASTERN DIVISION

| | | |
|---|---|---|
| JOHN H. LARY,<br>*Plaintiff,* | ) | |
| vs. | ) | CIVIL ACTION NUMBER |
| THE REPUBLIC OF CHINA,<br>*Defendant.* | ) | **83-C-5461-NE** |

### ORDER OF DISMISSAL

This case is before the Court upon the motion of defendant, The Republic of China, for judgement on the pleadings. Having duly considered the motion, and the entire record herein, the Court is of the opinion that the motion is due to be granted.

For the reasons stated in **Jackson v. People's Republic of China**, 596 F. Supp. 386 (N.D. Ala. 1984), the Court concludes that the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1602 **et seq.**, does not apply retroactively to a cause of action arising out of a 1911 transaction. The doctrine of absolute sovereign immunity, which was in effect when the bonds herein were issued as well as when they matured, bars this action. It is therefore,

ORDERED, ADJUDGED and DECREED that this case shall be, and the same hereby is, DISMISSED with prejudice. Costs shall be taxed against the plaintiff.

DONE this 30th day of August, 1985.

/s/ U.W. CLEMON

United States District Judge
U.W. Clemon

# APPENDIX C

## Order Of Eleventh Circuit Court Of Appeals Affirming The Setting Aside Of Judgment And Dismissal Of Case

Russell JACKSON, et al.; individually and on behalf of all other holders of five percent Hukuang Railways Bearer Bonds issued by the Imperial Chinese Government in 1911, similarly situated, Plaintiffs-Appellants,

v.

The PEOPLE'S REPUBLIC OF CHINA, a foreign government, Defendant-Appellee.

No. 84-7744.

United States Court of Appeals, Eleventh Circuit.

July 25, 1986.

Before GODBOLD, Chief Judge, JOHNSON, Circuit Judge, and TUTTLE, Senior Circuit Judge.

GODBOLD, Chief Judge:

We must decide whether in this case the courts of the United States have subject matter jurisdiction over the People's Republic of China. This requires us to examine whether the Foreign Sovereign Immunity Act of 1976 (FSIA), 28 U.S.C. § 1330, 1391 and 1602, *et seq.*, which confers subject matter jurisdiction over foreign sovereigns (with various exceptions), is to be applied retroactively with respect to actions by the governments of China relating to bonds issued by the government of China in 1911.

Before reaching the central issue, we must decide whether the district court erred in setting aside a default judgment entered against the PRC.

The People's Republic (PRC) also raises as a preliminary issue whether, under principles of international law, despite the domestic law of the United States, the courts of the United States have no jurisdiction over any claims against the PRC as a sovereign nation.

The district court entered three determinations. *Jackson v. People's Republic of China*, 550 F.Supp. 869 (N.D.Ala. 1982) (finding jurisdiction and entering default judgment); unpublished order, 2/27/84 (setting aside default judgment); 596 F.Supp. 386 (N.D.Ala.1984) (finding no jurisdiction and dismissing the case).

We hold that the district court did not err in setting aside the default judgment against the PRC. And, reaching the central issue, we hold that the district court was correct in holding that it lacked subject matter jurisdiction because the FSIA did not apply retroactively to confer subject matter jurisdiction in this case.

I. *The facts and the proceedings in the district court*

In 1911 the Imperial Government of China issued bearer bonds to assist in financing the building of a section of the Hukuang Railway that runs between Guangzhou (Canton) and Beijing (Peking). The loan was for 6,000,000 pounds sterling, negotiated and participated in by a consortium of British, German, French and American banks. The loan agreement authorized the issuance of bonds for sale in the United States and bonds were sold to purchasers in this country.

Soon after the bonds were issued the Revolution of 1911 ensued, and the Republic of China supplanted the Imperial Chinese government. The Republic of China made interest payments on the Hukuang bonds until the mid-1930's when it began to have financial and other difficulties.

Plaintiffs introduced expert testimony in the district court attempting to show that the bonds were renegotiated in 1937 by an agreement between the Chinese Nationalist government and an American bondholders' committee representing the lenders, providing for an interim interest rate reduction and for amortization to begin again in 1949 and to be completed in 39 years from 1937, which would be 1976. Statements filed by the PRC say that renegotiation was discussed but no agreement reached. Plaintiffs say that the obligations under the bonds were "reaffirmed" by the Nationalist government just

before its departure for Taiwan in 1948. The district court found that the renegotiation was never agreed upon, 550 F. Supp. at 852; 596 F.Supp. at 388 n. 2, and that the bonds matured in 1951, the original maturity date. Plaintiffs assert that these findings are plainly erroneous.

This class suit was filed November 13, 1979. Jurisdiction was alleged under the FSIA. Service of process was carried out under 28 U.S.C. § 1608(a) (4). PRC responded with a diplomatic note to the Department of State asserting that it enjoyed absolute sovereign immunity. In October 1981 the district court certified a class consisting of all persons who, as of October 22, 1981, were holders of the bonds. On October 28, 1981 the district court held that service of process was proper and, PRC not having appeared, ordered a default. PRC was served with a copy of the class certification order and the notice of default but returned them to the State Department, reasserting absolute immunity.

At plaintiffs' request an evidentiary hearing was conducted. On September 2, 1982, the court held that it had subject matter jurisdiction and that plaintiffs were entitled to all unpaid principal and interest on the bonds, and it entered a judgment of $41,000,000-plus. 550 F.Supp. 869. The PRC sent a diplomatic note to the district court in January, 1983, stating that the rulings of the district court violated "basic norms of international law," and should the court proceed with the default judgment against China and attach China's properties in the United States, the Chinese government reserved its right to take "corresponding measures."

In mid-1983 the plaintiffs began efforts to execute on their judgment. In July or August 1983 the PRC appeared in the case for the first time, filing motions to vacate the judgment under Rule 60(b) (1), (4) and (6) and to dismiss the case. The United States, through the Departments of State and Justice, filed two statements of interest, supported by numerous documents, backing the PRC's motions.

The district court granted the motion to vacate and conduct-

ed an evidentiary hearing on the motion to dismiss and determined it would be treated as a motion for summary judgment. Plaintiffs presented expert testimony. PRC did not appear; the United States was present but did not participate. The district court entered an order dismissing the case on the ground that the FSIA did not have retroactive effect so as to confer subject matter jurisdiction over transactions that predated 1952. 596 F.Supp. 386.

In this court the PRC filed a brief but instructed its counsel not to appear for oral argument. The United States filed a statement of interest and was permitted to argue.

II. *Changing concepts of sovereign immunity under U.S. law*

For more than a century and a half, since *The Schooner Exchange v. McFaddon,* 11 U.S. (7 Cranch) 116, 137 (1812), the United States usually granted foreign sovereigns complete immunity from suit in the courts of this country. Under our law foreign sovereign immunity is a matter of grace and comity on the part of the United States and is not a restriction imposed by the Constitution itself. *Verlinden B.V. v. Central Bank of Nigeria,* 461 U.S. 480, 103 S.Ct. 1962, 76 L.Ed.2d 81 (1983). Accordingly, until 1952, our courts consistently deferred to the decisions of the executive branch on whether to take jurisdiction of actions against foreign sovereigns and their instrumentalities. Ordinarily the State Department would request immunity in all actions against friendly foreign sovereigns. *Id.* at 486, 103 S.Ct. at 1967. However, in the decade before 1952 the Supreme Court's doctrinal foundation for sovereign immunity began to shift from formal principles of international law to avoiding embarrassment to those responsible for the conduct of our foreign affairs. *Victory Transport, Inc. v. Comisaria General de Abastecimientos y Transportes,* 336 F.2d 354, 357 (2d Cir.1964), *cert. denied* 381 U.S. 934, 85 S.Ct. 1763, 14 L.Ed.2d 698 (1965); *Ex Parte Peru,* 318 U.S. 578, 63 S.Ct. 793, 87 L.Ed. 1014 (1943); *Republic of Mexico v. Hoffman,* 324 U.S. 30, 65 S.Ct. 530, 89 L.Ed. 729 (1945).

In 1952 the State Department issued the "Tate Letter,"[1] which announced formal adoption by it of the "restrictive" theory of foreign sovereign immunity. Under this theory immunity is confined to suits involving the public acts of a foreign sovereign and does not extend to cases arising out of strictly commercial acts of a foreign state. After the Tate Letter the executive, acting through the State Department, usually would make "suggestions" on whether sovereign immunity should be recognized by a court, and courts generally abided these suggestions. This proved troublesome, because foreign nations at times placed diplomatic pressure on the State Department, and political considerations led to suggestions of immunity where it was not available under the restrictive theory. *Verlinden*, 461 U.S. at 487, 103 S.Ct. at 1968. Moreover, foreign nations did not always make requests to the State Department, and responsibility fell to the courts to determine whether sovereign immunity existed. With two different branches involved the governing standards were neither clear nor uniform. *Id.* at 488, 103 S.Ct. at 1968.

In 1976 Congress passed the FSIA, effective in January 1977.

> By reason of its authority over foreign commerce and foreign relations, Congress has the undisputed power to decide, as a matter of federal law, whether and under what circumstances foreign nations should be amenable to suit in the United States.

*Id.* at 493, 103 S.Ct. at [sic.] It was adopted to free the government from case by case diplomatic pressures, to clarify the governing standards, and to assure that decisions are made on purely legal grounds and under procedures that insure due process. *Id.* at 488, 103 S.Ct. at 1968. In 28 U.S.C. § 1330 the Act confers jurisdiction of any in personam nonjury civil action against a foreign state with respect to which the foreign state is not entitled to immunity under §§ 1605-1607. The latter sections

[1]Reprinted in 26 Dept. of State Bull. 984-85 (1982) and in *Alfred Dunhill of London, Inc. v. Cuba*, 425 U.S. 682, 711, 96 S.Ct. 1854, 1869, 48 L.Ed.2d 301 (1976) (App. 2 to opinion of White, J.).

codify into federal law the restrictive theory of sovereign immunity. Thus in many instances the substantive immunity law issues arising out of the sovereign immunity sections, §§ 1605-1607, must be resolved to determine if the court has jurisdiction. *Corporacion Venezolana de Fomento v. Vintero Sales Corp.*, 629 F.2d 786, 790 n. 4 (2d Cir.1980), *cert. denied* 449 U.S. 1080, 101 S.Ct. 863, 66 L.Ed.2d 804 (1981).

Both subject matter jurisdiction and personal jurisdiction turn on application of the substantive provisions of the FSIA. If none of the exceptions to sovereign immunity set forth in the Act applies, the court lacks both statutory subject matter jurisdiction and personal jurisdiction. *Verlinden*, 461 U.S. at 485 n. 5 and 493, 103 S.Ct. at 1967 n. 5 and 1971. In determining whether the court has jurisdiction through application of one of the exceptions, the court must apply the detailed federal law standards set forth in the Act itself. *Id.* at 494, 103 S.Ct. at 1971.

III. *Absence of jurisdiction because of international law*

At the threshold China stands on the principle of absolute sovereign immunity as a fundamental aspect of its sovereignty. Its position is that under principles of international law it is immune from any suit in a domestic court of any other nation unless it consents. According to the United States' statement of interest:

> China's adherence to this principle results, in part, from its adverse experience with extraterritorial laws and jurisdiction of western powers [within China] in the nineteenth and early twentieth centuries.

China asserts that restrictive sovereign immunity has not become a rule of international law, although in recent years some nations have begun to follow it, but these are, China says, only a small number of nations and by and large do not include developing countries, which find restrictive sovereign immunity not in their interest.

China contends that the United States cannot, by a change in its domestic law, abrogate the long accepted international law principle of absolute sovereign immunity. Even though restrictive sovereign immunity may be a developing customary rule of international law, China says that it is not binding upon sovereign states that do not agree with it. Thus, according to China, restrictive sovereign immunity is applicable only within the group of nations that have adopted it and is not applicable to China, which continues to adhere to the principle of absolute sovereign immunity. Finally, China contends that even if sovereign immunity can be changed by the United States, to apply the change retroactively would violate international law.

The district court did not rule on these international law questions, since it held that the suit was barred under United States domestic law. We follow the same course.

## IV. *Setting aside the default*

The district court set aside the default judgment under Fed. R.Civ.P. 60(b), which provides in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

Motions under Rule 60(b) are directed to the discretion of the trial court. The rule is equitable in origin, and the court

may take action appropriate to accomplish justice. *Klapprott v. U.S.*, 335 U.S. 601, 614-15, 69 S.Ct. 384, 390-91, 93 L.Ed. 1099 (1949). In the exercise of its discretion the trial court must carefully interpret the provisions of the rule to preserve the delicate balance between the sanctity of final judgments and the demands of justice. *Griffin v. Swim-Tech Corp.*, 722 F.2d 677 (11th Cir.1984).

We hold that the district court did not abuse its discretion in granting the PRC's motion under subsection (6) of Rule 60(b), which authorizes the court to set aside a judgment for all reasons except those set forth in the five preceding clauses. This subsection gives the courts ample power to vacate judgments whenever appropriate to accomplish justice. *Menier v. U.S.*, 405 F.2d 245 (5th Cir.1968); Moore's *Federal Practice* § 60.27[2]. Relief under this clause, however, is an extraordinary remedy, which may be invoked only upon a showing of exceptional circumstances. *Ackermann v. U.S.*, 340 U.S. 193, 200, 71 S.Ct. 209, 212, 95 L.Ed. 207, 212 (1950); *Griffin*, 722 F.2d at 680. This case presents extraordinary circumstances justifying the district court's exercise of its equitable discretion.

Until January 1, 1979 the United States recognized the Republic of China, not the PRC, as the sole government for all of China. After recognition of the PRC, and beginning as early as 1980, representatives of the State Department attempted to explain to the PRC that the issue of sovereign immunity in this case must be decided by the courts of the United States and could not be determined by the executive branch and that PRC should retain counsel to appear in the district court and urge sovereign immunity and any other defenses.

In 1983 the United States sent a delegation to Beijing, and six days of meetings ensued concerning major international matters. The Chinese leader Deng Xiaoping brought up the default judgment and indicated to Secretary of State Schultz that the PRC regarded it as a serious matter and a major irritant in bilateral relations with the United States. During 1983 the foreign minister of China presented the Secretary of State

with an *Aide Memoire* stating that the PRC recognized no obligation to pay external debts incurred by earlier Chinese governments and that the PRC enjoyed absolute sovereign immunity. In additional meetings in Washington and Beijing the United States sought to assure China that it could appear through counsel without conceding jurisdiction under the FSIA and without waiving its position that it enjoyed absolute immunity under international law. The PRC reluctantly agreed to retain counsel to present its views in court.

The United States explained in its statements that because of the long absence of relations between the United States and the PRC there were only limited communications between the two governments on legal matters, leaving PRC authorities generally unfamiliar with United States judicial practice and procedure; that the Chinese view the bonds as an improper part of the Western powers' domination of China at the beginning of this century and as a direct cause of the Revolution of 1911; and that the PRC maintains that under the principle of nonliability for "odious debts" China bears no responsibility for the bonds.

In its statements of interest the United States urged that the default be set aside. In support of this position, Secretary of State Shultz filed an affidavit, setting out *inter alia*:

> The United States has had extensive consultations with the PRC [People's Republic of China] about this case and is informed about its facts and history. The United States believes that the PRC's initial failure to appear in these proceedings was based on its belief that international law did not require it to do so. . . . The United States has expended considerable diplomatic efforts over the last two and one-half years to persuade the PRC that it is appropriate under international and United States law, and in the best interest of bilateral relations between the two nations, that the PRC appear and present its defenses to this Court. . . . Permitting the PRC to have its day in court will significantly further United States foreign policy interests; conversely denying it

that day in court is likely to have a negative impact on United States interests.

* * * * * *

The present proceedings, and the default judgment against the PRC in particular, have become a significant issue in bilateral United States/China relations, as evidenced by Chairman Dèng's personal representations to me in February [1983], by China's representations to other Department officials throughout the duration of this lawsuit, and by the repeated diplomatic notes from the PRC that have been filed in these proceedings. The manner in which these proceedings are finally resolved can be expected, therefore, to have ramifications for other important United States interests with respect to China.

Also the district court had been notified by the PRC that if China's property in the United States was attached it reserved its right to take "corresponding measures."

We hold that the district court did not abuse its discretion in setting aside the judgment under Rule 60(b) (6). The district court correctly recognized that its Rule 60(b) power was discretionary and must be liberally construed to achieve substantial justice. It noted that the law disfavors default judgments. It pointed out, on the other hand, the desirability that final judgments not be lightly disturbed. And, it noted that where a defendant has meritorious defenses the interest in resolving the case on the merits prevails over the interest in finality of judgments. The PRC did have a defense — lack of subject matter jurisdiction.[2] In considering whether it should exercise its equitable discretion and whether extraordinary circumstances were involved, the court properly gave consideration to the Secretary of State's assessment of the foreign policy implications of the default judgment. Balancing all interests, the court found that it would be an abuse of discretion

[2]Arguably the default judgment was void since subject matter jurisdiction was lacking because of sovereign immunity. But we do not base our decision on this ground.

not to grant the motion under (4) and (6) of Rule 60.[3] We cannot fault this decision as to (b) (6).

Subsection (b) (4) provides that a judgment may be set aside because it is void. The court based its holding under this subsection on "the existence of pregnant questions relative to the jurisdiction of the Court." We do not need to address this ruling.

*Transit Casualty Co. v. Security Trust Co.*, 441 F.2d 788 (5th Cir.1971), holding that 60(b) (1) and (b) (6) are mutually exclusive and that a reason for relief under (b) (1) cannot be a basis for relief under (b) (6), did not bar the court from acting under (b) (6). In *Transit Casualty* a litigant sought to proceed under (b) (6) for a mistake pure and simple. Here much more is involved than mistake, inadvertence, surprise, or excusable neglect. The concerns extend to the misconception by an ancient and proud sovereign of its responsibility to reply to the demands of a United States court whose authority it does not recognize as a matter of international law, at a time when concepts of United States law and international law are changing. The issues arise in the highly sensitive area of relations of our government with another sovereign with whom tolerable relations have been restored after many years. They affect not only the interests of the PRC but of our own nation. In *Transit Casualty* itself the district court had considered whether relief should be granted under the broad equitable powers of (b) (6) and had found no basis to exercise its discretion, and this court, despite the language it used, reviewed this finding and affirmed it.

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[3]The district court observed that, in ruling on the default issue, it was not passing on the ultimate issue of subject matter jurisdiction, which it later reached in another order. This was an appropriate approach. The court had jurisdiction to examine its jurisdiction. As an incident of that examination it was free to inquire whether the judgment previously entered was to be vacated so that it could examine the jurisdictional issue free of any inferences that might flow from the existence of the judgment. As the court put it, after describing the sovereign immunity and FSIA questions: "The interests of justice require that these jurisdictional questions be determined in the context of adversarial proceedings."

Plaintiffs urge that the PRC is not entitled to an exercise of equitable discretion under (b) (6) because it has not offered to do equity. The gist of their argument is that China is acting inequitably because it continues to insist that as a matter of international law it enjoys absolute sovereign immunity which the United States cannot abrogate without its consent. We reject out of hand the contention that in seeking an adjudication of jurisdictional issues arising out of United States domestic law China acts improperly in reserving what it conceives are its rights under international law.

## V. *Jurisdiction under the FSIA*

In the district court, after the default was set aside, and before this court, the United States has asserted that the FSIA was not intended to apply to transactions that predate 1952.[4]

The district court held that the FSIA did not apply retroactively to confer subject matter jurisdiction in this case. The court originally concluded that *issuance* of the bonds was a "commercial activity" under § 1605 (a) (2). "Commercial activity" is defined in § 1603 (d). Later, after China appeared, the court expressed doubt about its conclusion, but, because of its holding of lack of jurisdiction, did not resolve the matter.

The district court made its analysis on the basis that the bonds matured in 1951. It considered general principles that militate against retroactive application of statutes. Against this background, the court examined three areas: the language of the statute, the legislative history, and the effect of retroactivity on antecedent rights of China. The court concluded that the Act itself contained no statement indicating that restrictive immunity was intended to apply to transactions that predated 1952. It noted, to the contrary, language of the Act that appeared to be prospective, "[c]laims of foreign states to immunity *should henceforth* be decided by courts of the United

[4]It has listed some six other cases pending in federal district courts asserting liability of foreign states for acts committed before 1952. These include suits against the USSR, Mexico, Poland and two against the PRC for bonds issued before 1920.

States in conformity with the principle set forth in this chapter." 28 U.S.C. § 1602. It noted further evidence of prospectivity in the provision for a 90 day delay period between enactment and effective date in order to give adequate notice to foreign nations of the United States' new policy of restrictive immunity. 28 U.S.C. § 1602 note "Effective Date."

The court examined the legislative history and found no support for retroactive application.

With respect to antecedent rights, the court noted that from 1911 to the date of maturity of the bonds in 1951 China relied on the expectation that the extant and almost universal doctrine of absolute sovereign immunity governed relations between China and the United States and between the citizens of the two countries. Concomitantly, China had no apprehension of being brought into court in the United States to answer for a default of the bond issue. Nor did the predecessors in interest of the bondholders' class have any expectation of any right to sue in the United States upon default. The court held that the statute should not be retroactively applied to alter antecedent rights unless it was the unequivocal import of its terms or the manifest intention of the legislators, a test set out in *Greene v. U.S.*, 376 U.S. 149, 160, 84 S.Ct. 615, 621, 11 L.Ed. 2d 576 (1964). It held the import of the terms and manifest intent of Congress to be to the contrary.

We agree with the district court's general approach to retroactivity. Courts normally presume that a legislative enactment is to apply prospectively, *Cox v. Schweiker,* 684 F.2d 310, 318 (5th Cir.1982), and the presumption is a strong one. *U.S. v. Security Industrial Bank,* 459 U.S. 70, 79, 103 S.Ct. 407, 413, 74 L.Ed.2d 235 (1982). We agree with the court's analysis of the language of the statute itself and of the legislative history. Indeed, both Senate and House Reports state that FSIA was not intended to affect the "substantive law of liability." S.Rep. No. 94-1310, 94th Cong., 2d Sess. 11 (1976); H.R.Rep. No. 94-1487, 94th Cong., 2d Sess. 12 (1976), U.S. Code Cong. & Admin. News 1976, p. 6610. We agree that to give the Act retrospective application to pre-1952 events would interfere with

antecedent rights of other sovereigns (and also with antecedent principles of law that the United States followed until 1952). It would be manifestly unfair for the United States to modify the immunity afforded a foreign state in 1911 by the enactment of a statute nearly three quarters of a century later.[5]

Our decision is consistent with the leading case on the issue of retroactivity of the jurisdiction-conferring section of FSIA, *Corporacion Venezolana de Fomento v. Vintero Sales*, 629 F.2d 786 (2d Cir.), *cert. denied* 449 U.S. 1080, 101 S.Ct. 863, 66 L.Ed.2d 804 (1980), in which a suit based on diversity was filed before the enactment of the FSIA. Jurisdiction was lacking, and after enactment of the FSIA the district court found that the FSIA supplied a basis for jurisdiction. The circuit court pretermitted the issue of whether Congress had power to confer jurisdiction in a pending case where none existed because "we cannot agree with the district court's view that Congress intended such retroactivity in the case of the FSIA." *Id.* at 791. The court focused upon the function of § 1330 as jurisdiction-conferring. It discussed *Andrus v. Charlestone Products*, 436 U.S. 604, 98 S.Ct. 2002, 56 L.Ed.2d 570 (1978), in which a case heard by the district court under an incorrect theory of subject matter jurisdiction was saved, in a jurisdictional sense, by enactment after the case began of a statute whose effect was to vest the court with jurisdiction. The mechanism was congressional elimination of the amount in controversy requirement in suits against the United States or its officers. The *Andrus* court held that this elimination created jurisdiction retroactively. The Second Circuit held that *Andrus* relied on the remedial purpose of the elimination of the amount in controversy and represented congressional correction of a "lacuna." In contrast, the court held passage of the FSIA was not to remedy a "lacuna" but rather was Congress' first codification of principles of sovereign immunity law. This

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[5]The decision we reach obviates consideration of China's contention that an interpretation giving the FSIA retroactive effect before 1952 would violate due process.

newly created jurisdiction was not intended to operate retroactively.

In *Venezolana* the district court had relied, as plaintiffs do, upon the language of the Act's preamble in § 1602, which states that "henceforth" cases should be decided in accordance with the principles of the FSIA. The circuit court rejected this, reading the language to mean only that decisions made henceforth should be governed by the substantive principles of immunity law adopted in the Act, and holding that the preamble did not purport to say anything about the retroactive application of the subject matter jurisdiction provisions in § 1330. Moreover, the court specifically recognized a "Congressional mandate to leave intact the *status quo ante* January 24, 1977 as respects rights of the parties." 629 F.2d at 790.

*See also Martropico Compania Naviera S.A. v. Perusahaan [etc.]*, 428 F.Supp. 1035, 1037 (S.D.N.Y.1977) : "[I]t seems clear that regardless of the effect of the Immunities Act on the removal of pending state actions, the original jurisdiction of the federal courts is prospective only."

In *Venezolana* the Second Circuit distinguished *Yessenin-Volpin v. Novosti Press Agency*, 443 F.Supp. 849 (S.D.N.Y. 1978) on the ground that it had applied substantive principles of immunity embodied in § 1605 to a case filed before the effective date of the FSIA and had not addressed the jurisdiction-conferring aspects of the Act. It distinguished other cases that have addressed the § 1330 jurisdiction-creating section in the context of removal statutes, which are construed strictly and involve the necessity of giving weight to the extent to which the action has progressed in the court where it was initially brought, *Martropico, supra,* or in the context in which the presence of a grant of interim relief, such as attachment in rem, brought into play the congressional mandate to not interfere with the rights of parties pre-January 24, 1977, *e.g., Amoco Overseas Oil Co. v. Com. Nat. Algerienne de Navigation,* 459 F.Supp. 1242 (S.D.N.Y.1978), *aff'd* 605 F.2d 648 (2d Cir. 1979).

Since the district court's decision in the present case the District Court for the District of Columbia has reached the same result in *Slade v. the United States of Mexico,* 617 F.Supp. 351. The court concurred with *Jackson,* and then made the same analyses of the policy against retroactivity, legislative history, statutory language, and interference with antecedent rights, and reached the same result.

Plaintiffs rely upon *Verlinden,* but it upheld the constitutionality of the Act and remanded for the court of appeals to consider whether jurisdiction existed under the Act.

We find no case, and plaintiffs refer us to none, where the FSIA has been applied to confer subject matter jurisdiction over pre-1952 transactions, activities and events.

Plaintiffs have not contended that if the bonds were renegotiated in 1937 so as to mature in 1976, the existence of the bonds in the United States after 1952, the failure to make interest payments on them after 1952, and default on them in 1976, by themselves, are such activities and events that the sovereign immunity exceptions in § 1605 are triggered and § 1330 jurisdiction is created retroactively for the span of years back to 1952.[6] To the contrary, plaintiffs reject the possibility of retroactivity only back to 1952 and insist that retroactivity is all or none.[7] They say that the language of § 1602 and the legislative history confirm a congressional expectation that the immunity standards of the Act apply to all future cases without exception. They reject the concept of a "bifurcated practice" distinguishing between events after January 24, 1977 and suits arising from earlier events. Appellants Brief pp. 58-59. They repeat this position in their Reply Brief p. 31:

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[6]Plaintiffs assert that the court erred in finding that the renegotiations were not agreed upon. But this assertion is made in the context of an argument that the district court might have reached a different conclusion about jurisdiction relating to the 1911 issuance had it realized that the bonds did not mature until 1976.

[7]There would be, of course, a substantial question whether the post-1952 events just described, by themselves, assuming renegotiation, are within the commercial activity provisions of § 1605 (a) (2) and the definition of commercial activity in § 1603 (d).

The appellant's original brief points out at pages 58-64 that there is no authority to limit the retroactive application of the FSIA so long as the action was filed after adoption of the FSIA. There is certainly no authority to grant retroactivity, but then to limit it by an extraneous event, the date the Tate letter was written and published. The act is either retroactive or it is not.

The district court correctly held there was no subject matter jurisdiction over plaintiffs' claim.

AFFIRMED.

## APPENDIX D

## IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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No. 85-7613

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JOHN H. LARY, JR.,

*Plaintiff-Appellant,*

vs.

THE REPUBLIC OF CHINA,
a foreign government,

*Defendent-Appellee.*

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Appeal from the United States District Court for the Northern District of Alabama

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## ON PETITIONS FOR REHEARING AND SUGGESTIONS FOR REHEARING EN BLANC

(Opinion August 22, 1986)

(October 28, 1986)

Before FAY, JOHNSON and CLARK, Circuit Judges.

PER CURIAM:

The Petitions for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en blanc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestions for Rehearing En Blanc are DENIED.

ENTERED FOR THE COURT

/s/ THOMAS A. CLARK

United States Circuit Judge
Thomas A. Clark

# APPENDIX E

**FOREIGN SOVEREIGN IMMUNITIES ACT OF 1976**, Pub. L. 94-583, 90 Stat. 2891, 28 U.S.C. 1330, 1331, 1391(f), 1441(d), 1602-1611.

## 28 U.S.C. § 1330, 1331, 1391(f), 1441(d)

§ 1330

(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title [28 USCS § 1603(a)] as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title [28 USCS §§ 1605-1607] or under any applicable international agreement.

(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title [28 USCS § 1608].

(c) For purposes of subsection (b), an appearance by a foreign state does not confer personal jurisdiction with respect to any claim for relief not arising out of any transaction or occurrence enumerated in sections 1605-1607 of this title [28 USCS §§ 1605-1607].

§ 1331

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

§ 1391(f)

(f) A civil action against a foreign state as defined in section 1603(a) of this title [28 USCS § 1603(a)] may be brought—

(1) in any judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated;

(2) in any judicial district in which the vessel or cargo of a foreign state is situated, if the claim is asserted under section 1605(b) of this title [28 USCS § 1605(b)];

(3) in any judicial district in which the agency or instrumentality is licensed to do business or is doing business, if the action is brought against an agency or instrumentality of a foreign state as defined in section 1603(b) of this title [28 USCS § 1603(b)]; or

(4) in the United States District Court for the District of Columbia if the action is brought against a foreign state or political subdivision thereof.

§ 1441(d)

(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title [28 USCS § 1603(a)] may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter [28 USCS § 1446(b)] may be enlarged at any time for cause shown.

# 28 U.S.C. § 1602-1611

§ 1602. Findings and declaration of purpose

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

§ 1603. Definitions

For purposes of this chapter —

(a) A "foreign state", except as used in section 1608 of this title [28 USCS § 1608], includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity —

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332 (c) and (d) of this title [28 USCS § 1332 (c), (d)], nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

§ 1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act [enacted Oct. 21, 1976] a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter [28 USCS §§ 1605-1607].

§ 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case —

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connec-

tion with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue; or

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to —

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state: *Provided,* That —

(1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent,

having possession of the vessel or cargo against which the maritime lien is asserted; but such notice shall not be deemed to have been delivered, nor may it thereafter be delivered, if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit — unless the party was unaware that the vessel or cargo of a foreign state was involved, in which event the service of process of arrest shall be deemed to constitute valid delivery of such notice; and

(2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title [28 USCS § 1608] is initiated within ten days either of the delivery of notice as provided in subsection (b) (1) of this section or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the date such party determined the existence of the foreign state's interest.

Whenever notice is delivered under subsection (b) (1) of this section, the maritime lien shall thereafter be deemed to be an in personam claim against the foreign state which at that time owns the vessel or cargo involved: *Provided,* That a court may not award judgment against the foreign state in an amount greater than the value of the vessel or cargo upon which the maritime lien arose, such value to be determined as of the time notice is served under subsection (b) (1) of this section.

§ 1606. Extent of liability

As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter [28 USCS §§ 1605, 1607], the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary in-

juries resulting from such death which were incurred by the persons for whose benefit the action was brought.

§ 1607. Counterclaims

In any action brought by a foreign state, or in which a foreign state intervenes, in a court of the United States or of a State, the foreign state shall not be accorded immunity with respect to any counterclaim –

(a) for which a foreign state would not be entitled to immunity under section 1605 of this chapter [28 USCS § 1605] had such claim been brought in a separate action against the foreign state; or

(b) arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state; or

(c) to the extent that the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state.

§ 1608. Service; time to answer; default

(a) Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned, or

(4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services — and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

As used in this subsection, a "notice of suit" shall mean a notice addressed to a foreign state and in a form prescribed by the Secretary of State by regulation.

(b) Service in the courts of the United States and of the States shall be made upon an agency or instrumentality of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States; or in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state —

(A) as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request or

(B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served, or

(C) as directed by order of the court consistent with the law of the place where service is to be made.

(c) Service shall be deemed to have been made —

(1) in the case of service under subsection (a) (4), as of the date of transmittal indicated in the certified copy of the diplomatic note; and

(2) in any other case under this section, as of the date of receipt indicated in the certification, signed and returned postal receipt, or other proof of service applicable to the method of service employed.

(d) In any action brought in a court of the United States or of a State, a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state shall serve an answer or other responsive pleading to the complaint within sixty days after service has been made under this section.

(e) No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court. A copy of any such default judgment shall be sent to the foreign state or political subdivision in the manner prescribed for service in this section.

§ 1609. Immunity from attachment and execution of property of a foreign state

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act [enacted Oct. 21, 1976] the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter [28 USCS §§ 1610, 1611].

§ 1610. Exceptions to the immunity from attachment or execution

(a) The property in the United States of a foreign state, as defined in section 1603 (a) of this chapter [28 USCS § 1603 (a) ], used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act [see effective date note to 28 USCS § 1602], if –

(1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or

(2) the property is or was used for the commercial activity upon which the claim is based, or

(3) the execution relates to a judgment establishing rights in property which has been taken in violation of international law or which has been exchanged for property taken in violation of international law, or

(4) the execution relates to a judgment establishing rights in property –

(A) which is acquired by succession or gift, or

(B) which is immovable and situated in the United States: *Provided,* That such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission, or

(5) the property consists of any contractual obligation or any proceeds from such a contractual obligation to indemnify or hold harmless the foreign state or its employees under a policy of automobile or other liability or casualty insurance covering the claim which merged into the judgment.

(b) In addition to subsection (a) , any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be

immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act [see effective date note to 28 USCS § 1062], if –

(1) the agency or instrumentality has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the agency or instrumentality may purport to effect except in accordance with the terms of the waiver, or

(2) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605 (a) (2), (3), or (5), or 1605 (b) of this chapter [28 USCS § 1605 (a) (2), (3), (5), (b)], regardless of whether the property is or was used for the activity upon which the claim is based.

(c) No attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608 (e) of this chapter [28 USCS § 1608 (e)].

(d) The property of a foreign state, as defined in section 1603 (a) of this chapter [28 USCS § 1603 (a)], used for a commercial activity in the United States, shall not be immune from attachment prior to the entry of judgment in any action brought in a court of the United States or of a State, or prior to the elapse of the period of time provided in subsection (c) of this section, if –

(1) the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, and

(2) the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state, and not to obtain jurisdiction.

§ 1611. Certain types of property immune from execution

(a) Notwithstanding the provisions of section 1610 of this chapter [28 USCS § 1610], the property of those organizations designated by the President as being entitled to enjoy the privileges, exemptions, and immunities provided by the International Organizations Immunities Act [22 USCS §§ 288 et seq.] shall not be subject to attachment or any other judicial process impeding the disbursement of funds to, or on the order of, a foreign state as the result of an action brought in the courts of the United States or of the States.

(b) Notwithstanding the provisions of section 1610 of this chapter [28 USCS § 1610], the property of a foreign state shall be immune from attachment and from execution, if —

(1) the property is that of a foreign central bank or monetary authority held for its own account, unless such bank or authority, or its parent foreign government, has explicitly waived its immunity from attachment in aid of execution, or from execution, notwithstanding any withdrawal of the waiver which the bank, authority or government may purport to effect except in accordance with the terms of the waiver; or

(2) the property is, or is intended to be, used in connection with a military activity and

(A) is of a military character, or

(B) is under the control of a military authority or defense agency.